IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

No. 3111

UNITED STATES GYPSUM COMPANY,
A Corporation,
Appellant,

vs.

THE MACKEY WALL PLASTER COMPANY,
A Corporation,
Appellee.

PETITION OF UNITED STATES GYPSUM COMPANY FOR REHEARING.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

Filed July ....., 1918.

....., *Clerk.*

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THE MACKEY WALL PLASTER COMPANY,
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PETITION FOR REHEARING.

Now comes United States Gypsum Company, a corporation, appellant, and respectfully petitions this Honorable Court for a rehearing of the above entitled cause, for the reason that:

I.

THIS COURT ERRED IN AFFIRMING THE DECREE OF THE DISTRICT COURT, BECAUSE:

A.

UPON THE RECORD IN THIS CASE THE CONTRACT INVOLVED LACKED MUTUALITY AND THEREFORE SHOULD NOT HAVE BEEN SPECIFICALLY ENFORCED AGAINST PETITIONER.

The provisions contained in the lease between the Mackey Company and the Great Northern Railway Com-

pany barred an assignment of the lease without the consent of the Railway Company thereto, which consent it might withhold or grant at its pleasure. Under such circumstances the contract can not and ought not be specifically enforced.

In *Ellis* v. *Treat,* 236 Fed., 120, this court said:

> "Even if the contract were specific and certain, we are of the opinion that within well-settled principles which govern specific performance, equity should withhold the specific relief here sought, on the ground that the complaint calls *for the performance of acts which require the participation of others not parties to the contract or to the suit,* such as the execution of articles of incorporation, the election of a board of directors, the adoption of resolutions, and other details of corporate action."

We can see little if any distinction and none in principle between the acts there mentioned and a consent by the Railway Company in this case. The contract here as well as there would seem to depend upon the performance of acts by a third person. And there being no right in the Gypsum Company to specific performance there is none in the Mackey Company.

B.

THE RECORD DOES NOT SHOW THAT THE RAILWAY COMPANY CONSENTED TO THE ASSIGNMENT. SPECIFIC PERFORMANCE OF THE CONTRACT SHOULD THEREFORE HAVE BEEN DENIED.

In any event, unless the Railway Company consented to the assignment, the contract could not be specifically enforced.

In *Hurlbut* v. *Kantzler,* 112 Ill., 482,

an action was brought for the specific performance of a contract to assign a lease. In denying the relief sought, the court said, among other things (p. 488):

> "The complainant has no equities against the board of education [the lessor], and no right, legal or equitable, to require them to consent to the assignment of either of the leases, in whole or in part. A party leasing has a right to prohibit any assignment of the lease without his assent, otherwise he might have his property occupied by a tenant he would not trust, or by one under no personal covenant to pay the rent. * * *
>
> There is no allegation in the bills, or proof, that the consent of the board of education will be given, or ever was given.
>
> * * * "If the court cannot compel the board to consent to an assignment to complainant, how can it secure the execution of a valid and binding transfer of the lease?"

In *Ellis* v. *Small,* 209 Mass., 147; 95 N. E., 79,

a bill was filed to compel an assignment of a lease which contained a covenant not to assign or underlet without

the written consent of the lessor. In denying the relief sought, the court said:

> "An assignment by the defendant would be a violation of the covenant and would give the lessor an immediate right of re-entry. There is nothing to show that the lessor has waived his right of re-entry. It would be futile, therefore, to compel the defendant to assign the lease. Under such circumstances equity will not enforce specific performance."

These were cases where the purchaser sought specific performance.

In *Roberts* v. *Geis,* 2 Daly (N. Y.), 535, 541, the vendor filed the bill. In denying the relief the court said:

> "This action is brought to compel the defendants to accept the assignment, irrespective of the landlord's consent, or for damages equivalent to the amount which the defendants agreed to pay for the assignment. No court of equity would compel the defendants to take a leasehold estate, pay the consideration therefor, when, by the very act of assignment, the landlord would have the right to re-enter and deprive them of the estate."

See, also:

Woodward v. *Aspinwall,* 5 N. Y. Sup. Ct. (3 Sandf.), 272.

These authorities make it clear (and we are aware of none in conflict with them) that the consent of the Railway Company to the assignment was a prerequisite to any specific enforcement of the contract either at the in-

stance of the Mackey Company or of the Gypsum Company.

And the District Court so held. That court thereupon, requiring the Mackey Company to obtain the consent as a condition to having a decree, granted an additional period of time to obtain the consent. (Transc., 207.)*

Whether or not the court was warranted in this latter action, it has been affirmed in that respect by this court and we bow to that decision.

Our contention, however, now is, as it was before, that the record and proof herein do not show that the requisite consent was in fact obtained. This question was discussed to some extent by us in our original brief under Point IV thereof, and we will not repeat what was there said. What little we say in addition, will be said in connection with the point following. Suffice it to say that, in our opinion, it is doubtful if the evidence was sufficient to prove a consent in an action to which the Railway Company itself was a party. Much less, we think, was it sufficient in this action. Much of the evidence was clearly incompetent as against the Gypsum Company (as for instance the correspondence between Veazey & Veazey and Broughton (Transc., 194, 196), and Katzenbach's evidence as to the corporate books and records (Transc., 187-192), and Hoover's testimony as to his conversation with Veazey, Jr. (Transc., 198), while the rest

*References are to the printed transcript.

of it, in our view, came far from establishing a valid and effective consent.

The District Court however, held that the so-called "consent" (Plff's Exh. "A", Transc., 177) was a sufficient compliance with the condition and directed the entry of the decree (Transc., 216). Again this court affirmed on the ground that "Under the circumstances the proof was clear that consent was given by the railway company before the original contract was executed." And further, "Suffice it to say that they, [the depositions] satisfactorily establish the execution of the consent by one of the vice-presidents of the Railway Company in June, 1909, prior to the execution of the agreement between the parties to the present litigation."

The holding of the District Court in this respect is not clear. In its first opinion, it apparently contemplated a *present* consent. (Transc., 207. See also Mem. Op., Transc., 208.) And subsequently the so-called "consent" was held to be a compliance with the condition. (Transc., 216.) This court holds the consent not a *present* one, but one given long prior hereto.

But whatever may be our views of the sufficiency of the evidence to prove a consent, and whatever difference there may be between the District Court and this court as to the nature of the "consent," both the District and this court actually *decided* the question of consent.

This then brings us to our principal contention, which is

C.

THAT ALTHOUGH THE DISTRICT COURT, AS WELL AS THIS COURT, ASSUMED THE RIGHT TO DECIDE THE QUESTION OF THE VALIDITY AND EFFECT OF THE SO-CALLED "CONSENT" IN THIS PROCEEDING TO WHICH THE RAILWAY COMPANY IS NOT A PARTY, AND ALTHOUGH SUCH QUESTION WAS ACTUALLY DECIDED, THE DECISION IS IN NO WAY BINDING UPON THE RAILWAY COMPANY. AS A RESULT THE GYPSUM COMPANY IS COMPELLED, BY THE DECREES OF THE DISTRICT COURT AND OF THIS COURT, TO TAKE A DOUBTFUL AND QUESTIONABLE TITLE. BOTH THE DISTRICT AND THIS COURT, WITHOUT DECIDING THE QUESTION, OR ATTEMPTING TO DECIDE THE QUESTION, SHOULD HAVE DENIED THE RELIEF SOUGHT.

Authorities are hardly necessary for the proposition that equity will not compel a purchaser to take a doubtful title.

As is said in *Pomeroy on Specific Performance* (§ 203):

> "One rule belonging to this branch of the subject is firmly established both in England and in the United States. A specific performance will never be decreed at the suit of the vendor whenever the doubt concerning his title is one which can only be settled by further litigation, or when the court can see that the purchaser will, with reasonable probability, be exposed to *bona fide* adverse claims on the part of third persons, and to the risk of litigation for the purpose of enforcing such claims. The reason of this rule is as obvious as the rule itself is just. The present decree binds only the parties to the suit and constitutes no bar nor even obstacle to proceedings by those who assert a right in conflict with the title which the vendor purports to hold and to transfer."

And in 36 Cyc., 632:

> "To force upon the vendee a title which he may be compelled to defend in the courts, is to impose upon him a hard bargain, and this a court of equity in the exercise of its discretion, will refuse to do, *irrespective of the question whether the title is actually good or bad.*"

See *Wesley* v. *Eeles,* 177 U. S., 370, and cases cited therein.

See also,

Fleming v. *Burnham,* 100 N. Y., 1,

and other cases also cited in our original brief.

Certainly, no *present* consent was obtained. The decree rests entirely upon the writing purporting to be a consent executed, if at all, in 1909. No present officer or director of the Railway Company testified or was called to testify that the Railway Company consented to the assignment or that the Railway Company recognized this "consent" as effective and binding upon it, or that the Railway Company confirmed or ratified the "consent" in any respect whatsoever. Farrington was neither an officer nor director when he testified, nor had he been since 1912 (Transc., 185). Katzenbach's testimony related only to the corporate records, etc. Broughton was not called as a witness, nor did he testify, *although the notice, affidavit and order for taking the depositions specified Broughton as a necessary witness* (Transc., 211, 213, 210). In lieu of his testimony a letter was introduced in evidence, alleged to have been sent by

his office, a letter not at all competent as against the Gypsum Company, whatever might be its effect as against the Railway Company.

Likewise, E. C. Lindley was named as a necessary witness. But Lindley was not called in person to testify; and, as in Broughton's case, a letter supposed to have come from Lindley's office was presented, apparently to take the place of Lindley himself.

The "consent" itself is undated and is without the corporate seal, and therefore was incomplete and insufficient on its face, and was so held to be by the District Court (Transc., 208). Effect could be given it only through extrinsic evidence, through the testimony of witnesses and other extraneous proof. Questions of fact as to execution, authority to execute, and delivery, etc., arose respecting it which would have to be answered. Hoover, himself, testified to a conversation with Veazey, Jr., according to which the "consent" had never been delivered (Transc., 198).

Where the title rests upon doubtful questions of fact, and the rights of third persons are involved who are not parties to the proceeding, specific performance will be denied. Such a title is not marketable.

In *Lippincott* v. *Wikoff* (N. J.), 33 Atl., 305, the court reviews a large number of authorities, and says:

> "In cases where the doubt in relation to title is one of fact which the court is called on to consider, the general rule has been declared to be that the

> court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings."

In *Irving* v. *Campbell* (N. Y.), 24 N. E., 821, plaintiff vendor sued for specific performance. One link in the chain of title was a deed from Thomas Lawrence, through which deed plaintiff claimed. Owing to a defect in the acknowledgment of the deed it was necessary to prove the deed and delivery by parol. The court denied specific performance, saying:

> "That the deed from Lawrence to Eliza Irving was actually made and delivered to the grantee by Lawrence was satisfactorily proved upon the trial of this case; but such proof rested altogether in parol, and might or might not be available to the holders of title under the plaintiff in any subsequent litigation between them and adverse claimants under Lawrence. * * *
>
> Whatever conclusion might be reached by us in this case as to the validity of the plaintiff's title, must, therefore, be unavailing to her grantee in any future contest with claimants under Lawrence either by inheritance or purchase. In the absence of a good record title he must necessarily be driven to rely for a defense upon parol evidence, which might then be assessible or not, according to circumstances beyond his control."

And it will be noted that in the case just cited, the fact of execution and delivery the court deemed to be proved. Still specific performance was denied.

See also *Moore* v. *Williams* (N. Y.), 22 N. E., 233, wherein it is said:

> "A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence."

And *Fleming* v. *Burnham* (N. Y.), 2 N. E., 905-7, where it is said:

> "It would be especially unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented on the application might be changed on a new inquiry, or are open to opposing inferences."

The District Court and this court in this case have adjudicated the rights of the Railway Company in this leasehold property in an action in which the Railway Company could not even be heard. Does this court hold that these decrees could in any way affect its interest? That these decrees in this action in which the Railway Company had no right to be admitted "make a defense, or examine witnesses, or appeal from a judgment he might think erroneous" are binding upon it?

The question as to the present effect of the "consent" was a most serious one.

As we have heretofore said, whether this "consent" was effective in 1917 against the Railway Company, would depend upon facts and circumstances to be established by proof. But not only have the District Court and this court decided all these questions, although con-

fessedly the Railway Company is not bound thereby, but the Gypsum Company is required to take the title upon the strength of such decisions, although they are practically without effect. Whatever conclusion the District Court or this court might reach on this point in this action, would have no effect in a proceeding by the Railway Company to forfeit the lease, or in any other action which might be brought to try out the question. *The decrees in this case are wrong not so much because they decided the question of consent and decided it erroneously, but because they decided the question at all.*

In his work on Specific Performance, Mr. Pomeroy says:

> "It is the rule that in suits by a vendor, the purchaser will not be forced to complete the contract unless the title is free from any reasonable doubt. * * * If, however, there arises, either in the face of the pleadings, or from the examination made during the progress of the suit, a reasonable doubt concerning the title to be made and given by the vendor, the court, *without deciding the question between the parties then before it*—which decision might not be binding upon third persons, and, therefore, might not prevent the same question from being subsequently raised by other claimants of the land—regards the *existence* of this doubt as a sufficient reason for not compelling the purchaser to carry out the agreement and accept a conveyance."

What is the result? The Gypsum Company is compelled to pay more than $50,000 for a property, and it does not know when it receives the property whether

its title thereto is good or not. If the Railway Company, in fact, consented, i. e., if this document, the so-called "consent," is now binding upon the Railway Company, the Gypsum Company's title will be good. If on the other hand the Railway Company has not in fact consented, i. e., if the so-called "consent" is denied force and effect as against the Railway Company, the sale and assignment to the Gypsum Company is a breach of the covenant in the lease and the title of the Gypsum Company to a most important portion of the properties is subject to immediate destruction. Notwithstanding the decrees herein, the question of consent is still open to the Railway Company.

Immediately after the deed passed to the Gypsum Company the Railway Company could declare a forfeiture of the lease and could institute proceedings to oust the Gypsum Company from possession. Why should the Gypsum Company be required to pay its money for the privilege of further litigation?

Your petitioner therefore prays that an order may be made for a re-hearing of the argument in this cause, on a day to be appointed by the court, at such time and upon such points as the court may direct.

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CERTIFICATE.

I, John E. MacLeish, hereby certify that I am counsel for United States Gypsum Company, Appellant in this cause, and petitioner herein, and that the foregoing petition for re-hearing is, in my judgment, well founded, and that it is not interposed for delay.

John E. MacLeish.